IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 23RD FEBRUARY 2007 / 4TH PHALGUNA 1928

CRL.A.No. 1707 of 2003()

SC.221/2002 of ADDL. DISTRICT & SESSIONS JUDGE (ADHOC) FAST TRACK-I, MANJERI
CP.8/2002 of JUDL. MAGISTRATE OF FIRST CLASS COURT, PARAPPANANGADI
.....

APPELLANT: ACCUSED NO.7:

SHARAFU @ SHARAFUDHEEN,
S/O. HUNHARAMMU, AGED 25 YEARS,
PALAKKAL, MELAKALATHIL, VELIMUKKU AMSOM,
DESOM.

BY ADV. SRI.P.F.FRANCIS

RESPONDENTS: RESPONDENT:

STATE OF KERALA, REPRESENTED BY
THE PUBIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23/02/2007, ALONG WITH CRA NO. 1833 OF 2003 & CONNECTED CASE, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.A.Nos.1707, 1833, 1851 of 2003,
& 836, 1098 of 2004

Dated 23rd February, 2007

JUDGMENT

Koshy,J.

Seven accused were charge sheeted for offences punishable under sections 341, 398 & 302 read with section 34 of the Indian Penal Code. A5 and A6 were absconding and their cases were split up. Case of A3 was also split up as he was not found originally and that was separately tried in S.C.No.41 of 2004. A1, A2, A4 and A7 faced trial in SC.No.221 of 2002. The court charge is as follows:

> "That at about 7.30 P.M. on 7.6.2000 all of you in furtherance of your common intention to commit dacoity came in a Maruthi van bearing Registration Number-IN 9450 and that you had restrained the deceased Ganapathi and his son the defacto complainant, who were proceeding to their house after closing their jewellary shop, in their scooter No.KL-10E 28 and that the accused No.1 and 2 among you had stabbed Ganapathy with a knife on his chest, back and neck and inflicted fatal injuries and that he had succumbed to the injuries at Government Hospital, Thirurangadi, and that accused No.3 to 7 among you had acted in conjointly committing dacoity along with accused No.1 and 2 and all of you have committed offences punishable under Section 341, 396, 302 r/w. 34 of I.P.C. at Chettipadi within the cognizance of this Court....."

The Sessions Court convicted A1 and A2 for offence punishable under section 302 read with Section 34 of the Indian Penal Code and sentenced to under go rigorous imprisonment for life and to pay a fine of Rs.1,50,000/= each. They were also convicted for offence punishable under section 398 of I.P.C. and sentenced to under go rigorous imprisonment for life. They were further found guilty for offence punishable under Section 341 and sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.500/= each. A3 (sole accused in S.C.No.41/2004) and A4 (S.C.No.221/2002) were also convicted and sentenced to undergo rigorous imprisonment for life under section 398 IPC with compensation of Rs.50,000/= payable under Section 357(3) I.P.C. A7 was sentenced to undergo rigorous imprisonment for 10 years under section 398 IPC and to pay a compensation of Rs.50,000/= under section 357(3) IPC. A3, A4 and A7 were also convicted for the offence punishable under Section 341 IPC and sentenced to undergo simple imprisonment for one month with a fine of Rs.500/=. Even though the case against A3 was separately tried, the evidence relied on by the learned Sessions Judge were almost same in both the cases. Therefore, we are disposing all these appeals

by this common judgment. The evidence of witnesses are also similar in character. Against the conviction and sentence first accused filed Crl.A.No.1833 of 2003, second accused filed Crl.A.No.836 of 2004, third accused filed Crl.A.No.1098 of 2004, fourth accused filed Crl.A.No.1851 of 2003 and seventh accused filed Crl.A.No.1707 of 2003.

2. The prosecution case is that at about 7.30 p.m. on 7.6.2000, all the accused, in furtherance of their common intention to commit dacoity, came in a Maruthi van bearing Registration No.T.N.23D/9450, that they restrained the deceased Ganapathi and his son (PW1) who were proceeding to their house after closing their jewellery shop, in their scooter bearing Registration No.KL-10E.28, that the accused Nos.1 and 2 stabbed Ganapathi with knife on his chest, back and neck and inflicted fatal injuries at Chettipadi, that he succumbed to his injuries on the way to Government Hospital, Thirurangadi and that accused Nos.3 to 7 acted in conjoining, in committing dacoity along with accused Nos.1 and 2. We are describing the array of witnesses as mentioned in S.C.No.221 of 2002 (unless otherwise stated) for the purpose of convenience.

3. PW1, son of the deceased Ganapathi, gave Ext.P1 F.I. Statement and Ext.P12 is the F.I.R. In Ext.P1 F.I. Statement, which was given without much delay, he stated that on 7.6.2000 at about 7 p.m. as usual he and his father, deceased Ganapthi, were proceeding to their house, after closing their jewellery shop at Chettipadi, in their Scooter bearing Registration No.KL 10E.28. He was having about 1½ Kgs of gold ornaments and he was seated as the pillion rider. When they passed Chettipadi railway gate, he saw a white Maruthi van following them. Several times he looked back and noticed the Maruthi van following them. When they reached very near to their house, he again looked back and he saw that the sliding door on the left hand side of the Maruthi van was kept opened and he noticed that two persons were sitting and a person who was sitting on the left side had a knife with him. Apprehending danger, he asked his father to speed up the vehicle. But, when they came near Jameela Manzil, the Maruthi van overtook and blocked the scooter so that they cannot proceed further. The scooter capsized and both of them fell on the ground. Immediately, the person with the knife and the other person jumped out of the van. PW1 and his father cried

aloud and PW1 ran towards the nearby house of Ravi. The neighbours including Sasi and Babu ran towards the place of incident. Sasi took Ganapathi in an autorickshaw to Chettipadi hospital and thereafter to the Government hospital, Thirurangadi. By the time PW1 reached the hospital, his father died. He stated that his father was killed by the joint action of the driver and two persons mentioned earlier and body of the father was kept in the mortuary of the Government Hospital. This statement was given at 11 p.m. on 7.6.2000 itself. His deposition before the court below was consistent with the F.I. Statement. Even though he was cross examined by several advocates appearing for different accused, evidence of PW1 was not shattered. Further, even in the deposition he stated that he saw only one person having knife (later identified as A1). He did not implicate other accused except the driver (A4), A1 and A2. He identified A4 as the driver in the court. He identified A1 and A2 in the test identification parade conducted by the Judicial First Class Magistrate (PW11). A4 was identified in the test identification parade conducted by PW12 (JFCM). The trial judge who saw the demeanour of witnesses also believed the evidence of PW1. After going through the

evidence, we fully believe PW1. If he had any intention to give further evidence, he could have stated that he had seen other persons carrying weapons etc, but, he stated that he has not seen others (that does not mean that there were no others in the van). He also stated that after A1 and A2 jumped out from the van, when the scooter fell down, he rushed with the gold. Earlier itself he felt that the Maruthi van was following them and he was under the apprehension of danger. Then they were cornered by the Maruthi van overtaking them, the door was opened and A1 and A2 jumped out of the van. Even though there was no time, he could identify the persons and those identifications were fortified in the test identification parade. He identified them in the court also which is a substantive evidence.

4. PW2 is the person who took the deceased to the hospital. Admittedly, he has not seen the incident. But, he also stated that on getting information from PW1, he rushed to the spot and took the deceased to the hospital after seeing the deceased in such a condition. He further stated that since he had seen the scooter lying there, he only mentioned to

the doctor that injury was caused due to road traffic accident. PWs 3, 4, 5 and 6 are persons who were standing at the junction in the evening for purchasing articles etc. and they saw the Maruthi van going behind the scooter. It is a Tamil Nadu registration van and the van took a random turn and then followed the scooter. PW3 identified A1, A2, A3, A4, A5 and A7. Similarly, PW5 identified A1, A2, A3 and A4. PW4 who was declared hostile identified A1, A4, A5 and A6. It is true that even though A4 was identified by PW4, in one part of his statement it is recorded that he identified A4 sitting in the back seat. A4 at the sessions trial was arrayed as A3, but, that is due to different serial numbers given in the crime to the accused and there was no mistake. It was not very dark at the time of incident even though it is immediately after sun set. The doctor of the Government hospital who treated the injured when he was taken to the hospital deposed that the deceased was brought to the casualty at 7 p.m. So, it was before 7 p.m. the incident occurred. With regard to A3, apart from identification by PWs 3 and 5 (in the second trial PWs 6 and 8) as the man sitting in the front seat beside the driver, PW7 (PW15 in the second trial) found him

at about 3 O' Clock, while he was on duty, travelling in the Maruthi car. It is not disputed that all the accused herein were involved in various theft cases especially theft of vehicles and the above constable has stated that A3 was questioned by him in connection with earlier cases and since A3 was travelling in the Maruthi van, he just noticed the same even though he did not make any special entry as he was only travelling in the Maruthi van. But, number of the Maruthi van was also remembered by him and when the incident happened he co-related the same with the incident. Ext.P6 is the postmortem certificate issued by PW10 doctor. Ante-mortem injuries noted are as follows:

(1) Incised stab wound 3.5 x .5cm, 4cm deep. Vertically oblique on the right of the front of chest with upper lateral square cut entry situated 4 cm to the right of mid-line and 2cm above nipple level, lower medial pointed end 1.6cm. to the right of mid-line and 11cm below collar bone. The wound cut the pectoralis, major muscle underneath to a depth of 4.5cm and was directed backwards laterally and slightly downwards.

(2) Incised penetrating wound 2x4cmx7.5cm (depth) on the left side of front of chest. The wound entered into the left chest cavity and it effects pericardiac of heart. The same wound

extended to the heart and left and right ventricle and also entered heart chambers and it is descending branch of the left coronary artery was also cut. Left chest cavity contained 550 grams of blood clots and 550 cc of fluid blood. Pericardiac sac contained 80 grams of blood clots and 60 cc of fluid blood. The wound also cut the upper opart of the 5th left rib.

(3) Incised stab wound 1.3 x 0.3 cm, vertically on the left side chest with the upper pointed end and situates 15 cm to the left of midline. The lower end was square cut. The upper end was 6.5cm away from the nipple level.

(4) Incised stab wound 1.5x0.3cm, 2 cm deep oblique on the outer aspect of left upper arm with 8.5 cm before the tip of shoulder, cutting the muscle underneath. (5) Incised stab wound 2.4x0.4cm, 3cm deep oblique, on the outer aspect of left upper arm with the upper back square cut end situates 5cm above the joint line of elbow. The wound pierced the muscle also 3cm.

(6) Injury is incised wound - 0.8 x 0.3 x 0.4cm vertical on the inner aspect of left upper arm 7cm above the joint line of elbow.

(7) Incised stab wound 2.4x0.4cm vertically oblique on the right side, penetrating the muscle underneath. The upper medium square cut and situated 3cm to the right of mid line and 10cm lacked the top of shoulder. The lower lateral pointed end was situated 4cm to the right of midline. The wound pierced the muscle underneath to the depth of 5.5cm and was directed forwards laterally and slightly upwards.

(8) Contused abrasion 4x1.8cm oblique on the lower half of front of left knee.

(9) Contused abrasion 2.3x1cm. Transverse on the outer aspect of front of left knee. The injury was 1.8cm lateral to injury No.8.

(10) Contused abrasion 4x2cm transverse on the front of left leg 5cm below injury No.8."

The doctor also deposed that injury Nos.1 to 7 could be caused with a sharp edged weapon like MO4. It appears that MO4 is a dangerous weapon. Length of MO4 (blade portion) from the metal portion to the tip is 10.5cm and its end is tapering. The width of MO4 in the middle portion of the blade is 1.5cm. Including the handle, total length is about 20 cms. All the injuries could not be caused with the knife MO5 as width of it's blade is 2cm – length is 9cm. Total length is 20.5cm. At bending point, the width of MO5 is 2cm. The injuries with smaller length like injury Nos.3 & 4 would not have been caused with MO4. Injury No.2 could be caused with MO5 also. Injuries 8 to 10 could be caused, if that portion of the body coming into contact with any hard object or surface. Injury Nos. 8 to 10 could be caused due to a fall from a scooter. The

evidence pointed out that it is not a road accident case as contended by the counsel.

5. As regards A1 and A2, we are of the opinion that A1 was identified by PWs 1,3,4 and 5. Further, identification of A1 was fortified by the recovery of blood stained MO4 knife on the basis of the confession made by him which is admissible under Section 27 of the Evidence Act. (See Ext.P14 seizure mahazar of MO4 knife, Ext.P14(a) confession statement of A1). The medical evidence also shows that the incident was not merely a road traffic accident, but, the deceased was stabbed brutally and it can be possible that the injuries can be caused with MO4 knife that was recovered from A1. His presence cannot be disputed. As regards A2 is concerned, it is true that he was not identified by PW4 who was declared hostile, but, he was identified by PWs 3 and 5 apart from PW1. With regard to A2 also we have already stated that we fully believe PW1. PW1 identified A2, but, he did not state that A2 was having any weapon with him. PW1 only stated that A1 jumped with the knife and A2 followed him and came near the scooter. Even MO5 weapon was recovered on the basis of confession by A2 (See

Exts.P15 & P15(a)). PW1 or any other witness has not stated that they saw A2 with weapon. Here, on the basis of recovery of MO5 knife alone it will be difficult to prove that A2 used the weapon. After PW1 ran away any other members of the gang in the van also might have used the weapon. In Ext.P15(a) confession statement by A2 there is no authorship of concealment. Disclosure of fact is only that A2 was aware of the place where MO5 knife was kept, but, it will not prove that he kept the same. As regards A3 is concerned, even though he was seen only by PWs 3 and 5 in a glimpse of time, he was identified in the test identification parade, but, there is no enmity attributed between PWs 3, 5 and A3. It is true that apart from their evidence, the evidence of PW7 (PW15) that he has seen A3 in a Maruthi van fortified that A3 also was present in the van. As far as A4 is concerned, several times PW1 looked back and in fact the van overtook them and cornered the scooter. Even though it is not specifically stated in the F.I. Statement that he identified the driver, he stated that several times he looked back and noted the driver of the van and the Maruthi van overtook the scooter and it was blocked. A4 was identified by all the four

witnesses in the test identification parade. We believe the evidence of PW1 which is corroborated by other evidence that A4 was driving the Maruthi van. With regard to A5 and A6, they were absconding. With regard to A7, only PW3 identified him. We are of the opinion that identification by PW3 alone, a single witness, is not giving confidence that A7 was with the other accused. His involvement in the incident is doubtful. Therefore, A7 is entitled to clear acquittal and he is acquitted.

6. With regard to A1, considering the medical and other evidences, he is the person who attacked the deceased with the knife and, hence, his conviction and sentence under section 302 of the Indian Penal Code is confirmed. Apart from the identification, the nature of injuries inflicted, the recovery and the medical evidence would show that MO4 was with him and everything points out the guilt of A1 for murder and his conviction and sentence for the offence punishable under Section 302 IPC requires no interference. He was also carrying deadly weapon while committing the offence of dacoity and in that process committed murder. Therefore, his conviction and sentence under

Section 396 read with Sections 398 & 341 of the Indian Penal Code needs no interference. As far as A2 is concerned, as deposed by PW1, he also jumped out from the Maruthi van and he has actively assisted A1. However, possession of weapon with him is doubted as found earlier. The evidence would show that all the accused shared the intention to cause dacoity and since there is no other evidence that A2 shared the intention to kill the deceased, we are of the opinion that his conviction and sentence under section 302 read with section 34 is liable to be set aside on the benefit of doubt. With regard to the conviction under section 398 IPC, we are of the view that since he was not having any weapon as deposed by PW1, he cannot be found guilty under section 397 or 398. Section 398 does not create any substantive offence, but, only regulates the measure of punishment in the commission of substantive offence of robbery or dacoity as held in **Emperor v. Nabibux Karimbux Mulla** (AIR 1928 Bombay 52(1)) and **Mahendra Singh v. State of M.P.** (1959 Cri.LJ 47 M.P.). In the charge sheet accused were charged under Section 396. Section 398 is referred only for the purpose of sentence. Hence, the argument that when Section 398 is attracted, life imprisonment cannot be awarded is

untenable. Substantive offence here is Section 396. But, if Section 398 is attracted, minimum punishment shall be seven years. Sections 397 and 398 cannot be used conjunctively or constructively as held by the Apex Court in **Paramjeet Singh** v. **State of Rajasthan** (2001 Crl.L.J. 757). In fact, as held in various court decisions, a person cannot be convicted under section 398 unless he is armed with a deadly weapon while committing or attempting to commit robbery or dacoity. Admittedly, on the basis of the evidence of PW1, A2 was not having any weapon with him. It is true that actual robbery did not take place because PW1 ran away with the entire gold. When five or more persons conjointly commit or attempting to commit robbery, every person so committing, attempting or aiding is said to have committed dacoity as stated in Section 391. Under Section 396 IPC it is stated as follows:

> "**396. Dacoity with murder.**- If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or (imprisonment for life), or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

In the case of committing dacoity (attempting to commit robbery conjointly by more than five persons is dacoity) if murder is caused, all persons who have conjointly committed the offence of dacoity are liable to be punished under Section 396 I.P.C. Dacoity begins as soon as an attempt is made to commit robbery by a gang of five or more persons and if a person is murdered during the attempt, every member of the gang are guilty under Section 396 IPC. (**Sita Ram** v. **Emperor** (AIR 1925 Oudh 723). It is not even necessary that murder need be previously in contemplation of the accused. Section 396 merely declares the liability of others as co-extensive with that of the actual murderer, if it occurs while committing dacoity as dacoity is a joint act. It is not necessary that others have taken part in the murder or aided the same or no intention to cause murder. (See **Samunder Singh** v. **State of West Bengal** (AIR 1965 Calcutta 598 (DB), **Shivappa** v. **State of Hyderabad** (AIR 1955 HYD. 147) and **Karim Bakhsh** v. **The Crown** (A.I.R. 1923 Lahore 329(1)). Here, A1, A2, A3, A4 and others attempted to commit dacoity. Identification of A7 was also not

established. But, in the gang there were more than five persons. A2 is the person who jumped along with A1 who committed murder in this case of dacoity. So, his role is much more than other accused in this case. Considering the evidence adduced, the second accused (appellant in Crl.A.No.836/2004) is convicted and sentenced to undergo rigorous imprisonment for five years with a fine of Rs.50,000/= under section 396 of the Indian Penal Code and in default of payment of fine, he shall undergo imprisonment for another one year. His conviction and sentence under section 302 of the Indian Penal Code is set aside by giving the benefit of doubt. No interference is needed in his punishment under Section 341 I.P.C.

7. As regards A3 and A4 are concerned, they were not having any weapon. PW1 did not see whether they jumped from the Maruthi van. A4 was the driver of the van in which A1 and gang came for committing dacoity. A3 was also in the gang and aided them. The Maruthi van itself will not come without a driver. Hence, committing dacoity by A3 and A4 cannot be

disputed and they are also convicted under section 396 of the Indian Penal Code. But, considering the nature of their participation and also considering the evidence, we are of the opinion that justice will be met if they are sentenced to undergo rigorous imprisonment for one year and we do so.

8. A7 is given benefit of doubt regarding identification and he is acquitted. If fine amount is deposited, it should be refunded to him. Certified to the trial court for due execution. All accused are entitled to the benefit of set off.

All the appeals are disposed of accordingly.

J.B.KOSHY
JUDGE

T.R.RAMACHANDRAN NAIR
JUDGE

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J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.A.Nos.1707, 1833, 1851 of 2003,
& 836, 1098 of 2004

Dated 23rd February, 2007

GIST OF JUDGMENT

Koshy,J.

Considering the evidence adduced, the second accused (appellant in Crl.A.No.836/2004) is convicted and sentenced to undergo rigorous imprisonment for five years with a fine of Rs.50,000/= under section 395 of the Indian Penal Code and in default of payment of fine, he shall undergo imprisonment for another one year. His conviction and sentence under section 302 of the Indian Penal Code is set aside by giving the benefit of doubt.

A3 and A4 are also convicted under section 395 of the Indian Penal Code. But, considering the nature of their participation and also considering the evidence, we are of the opinion that justice will be met if they are sentenced to undergo rigorous imprisonment for one year and we do so.

A7 is given benefit of doubt and is acquitted. All accused are entitled to the benefit of set off.

Appeals are disposed of accordingly.

J.B.KOSHY
JUDGE

T.R.RAMACHANDRAN NAIR

JUDGE

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